Supreme Court U
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No. 95-434

In the Supreme Court of the United States

OCTOBER TERM, 1995

EMPLOYERS INSURANCE OF WAUSAU, PETITIONER

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in deferring to the Environmental Protection Agency's interpretation of an order that the agency issued pursuant to its enforcement authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9606(a).

2. Whether the court of appeals correctly held that the procedures for judicial review available under CERCLA, which provide an opportunity for both pre-enforcement and post-enforcement hearings, satisfy due process requirements.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	16

TABLE OF AUTHORITIES

Cases:

AJA Associates v. *Army Corps of Engineers*, 817 F.2d 1070 (3d Cir. 1987)	16
Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967)	8
Adams Fruit Co. v. *Barrett*, 494 U.S. 638 (1990)	13
Barmet Aluminum Corp. v. *Reilly*, 927 F.2d 289 (6th Cir. 1991)	14
Bell Petroleum Services, Inc., In re, 3 F.3d 889 (5th Cir. 1993)	13
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	12
Caminetti v. *United States*, 242 U.S. 470 (1917)	11
Dickerson v. *Administrator, EPA*, 834 F.2d 974 (11th Cir. 1987)	14
Dico v. *Diamond*, 35 F.3d 348 (8th Cir. 1994)	12
Employers Ins. of Wausau v. *Bush*, 791 F. Supp. 1315 (N.D. Ill. 1992), aff'd, 27 F.3d 245 (7th Cir. 1994)	9
Environmental Transp. Systems, Inc. v. *Ensco*, 969 F.2d 503 (7th Cir. 1992)	5
Exxon Corp. v. *Hunt*, 475 U.S. 355 (1986)	3

Cases—Continued: Page

Gary Steel Supply Co. v. *Reagan*, 711 F. Supp. 471 (N.D. Ill. 1989) 16
Kelley v. *EPA*, 15 F.3d 1100 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 900 (1995) 14
Lone Pine Steering Committee v. *EPA*, 777 F.2d 882 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986) 2
Marozsan v. *United States*, 852 F.2d 1469 (7th Cir. 1988) 8
Marsh v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989) 12
Martin v. *Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991) 12, 13
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 9
Natural Resources Defense Council v. *EPA*, 824 F.2d 1211 (D.C. Cir. 1987) 5
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989) 2
Reardon v. *United States*, 947 F.2d 1509 (1st Cir. 1991) 14, 15
Schalk v. *Reilly*, 900 F.2d 1091 (7th Cir.), cert. denied, 498 U.S. 981 (1990) 14
Solid State Circuits, Inc. v. *EPA*, 812 F.2d 383 (9th Cir. 1987) 11, 14, 16
United States v. *Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992) 13
United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993) 13
United States v. *Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990) 2
United States v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) 11
Wagner Seed Co. v. *Daggett*, 800 F.2d 310 (2d Cir. 1986) 14, 15

Constitution, statutes, regulation and rule: Page

U.S. Const. Amend. V 9
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 7
5 U.S.C. 704 8
5 U.S.C. 706 8
5 U.S.C. 706(2)(A) 8
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* 2
§ 101(23), 42 U.S.C. 9601(23) 3
§ 101(24), 42 U.S.C. 9601(24) 3
§ 101(25), 42 U.S.C. 9601(25) 3
§ 104, 42 U.S.C. 9604 (1988 & Supp. V. 1993) 2, 3
§ 104(a)(1), 42 U.S.C. 9604(a)(1) 3
§ 106, 42 U.S.C. 9606 (1988 & Supp. V 1993) 6, 14
§§ 106-107, 42 U.S.C. 9606-9607 2
§ 106(a), 42 U.S.C. 9606(a) 3
§ 106(b)(2), 42 U.S.C. 9606(b)(2) 10, 11, 12
§ 106(b)(2)(A), 42 U.S.C. 9606(b)(2)(A) 4
§ 106(b)(2)(B), 42 U.S.C. 9606(b)(2)(B) 4, 7
§ 106(b)(2)(C), 42 U.S.C. 9606(b)(2)(C) 4, 7
§ 106(b)(2)(D), 42 U.S.C. 9606(b)(2)(D) 4, 7
§ 107, 42 U.S.C. 9607 (1988 & Supp. V 1993) 3, 13
§ 107(a), 42 U.S.C. 9607(a) 4, 6
§ 107(c)(3), 42 U.S.C. 9607(c)(3) 11
§ 107(*l*), 42 U.S.C. 9607(*l*) 15
§ 111, 42 U.S.C. 9611 3
§ 113(j)(1), 42 U.S.C. 9613(j)(i) 7, 10
Migrant and Seasonal Agriculture Worker Protection Act, 29 U.S.C. 1801 *et seq.* 13
Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 . 3
28 U.S.C. 1331 8
40 C.F.R. Pt. 300 6
Sup. Ct. R. 10.1 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 52 F.3d 656. The opinions of the district court (Pet. App. 19-38 and 39-60) are reported at 848 F. Supp. 1359 and 848 F. Supp. 1369.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18) was entered on April 12, 1995. A petition for rehearing was denied on May 17, 1995. On August 2, 1995, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 14, 1995. The petiton for a writ of certiorai

was filed on September 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, establishes a uniform framework for addressing the problem of inactive hazardous-waste sites throughout the United States. "CERCLA both provides a mechanism for cleaning up hazardous-waste sites, 42 U.S.C. §§ 9604, 9606 * * *, and imposes the costs of the cleanup on those responsible for the contamination, § 9607." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989). The President's authority under CERCLA, most of which has been delegated to the Environmental Protection Agency (EPA), includes the power to compel clean-up actions by potentially responsible parties or to undertake a federal response and recover expenses from responsible parties. 42 U.S.C. 9604, 9606-9607 (1988 & Supp. V 1993); see also *United States* v. *Ottati & Goss, Inc.*, 900 F.2d 429, 433 (1st Cir. 1990) (describing federal response options).

Because the primary purpose of CERCLA is the prompt elimination of threats to health and the environment posed by hazardous wastes, the statute authorizes a federal response prior to the ultimate determination and apportionment of liability regarding contamination at a particular site. See *Lone Pine Steering Committee* v. *EPA*, 777 F.2d 882, 886 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986). In order to facilitate the statutory objective of prompt clean-up of contaminated sites, CERCLA authorizes the EPA to pursue three alternative response options when the agency determines that there has been an actual or

threatened release of a hazardous substance. 42 U.S.C. 9604(a)(1). First, the EPA may respond directly by using monies from the Superfund[1] to undertake removal or remedial actions[2] that it deems "necessary to protect the public health or welfare or the environment," then seeking to recover the costs of the clean-up from responsible parties. 42 U.S.C. 9604 and 9607. Second, the EPA may bring an action in federal district court to obtain an order requiring responsible parties to take such action as may be necessary to abate the threat posed by the hazardous substance. 42 U.S.C. 9606. Third, as in this case, the EPA may issue an administrative order pursuant to Section 106(a) of CERCLA, 42 U.S.C. 9606(a), directing potentially responsible parties to take appropriate response actions.

Before October, 1986, entities that received a CERCLA administrative order could either comply with the order or refuse to do so and risk an EPA enforcement action. In 1986, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613. SARA amended CERCLA to create a procedure

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[1] The Hazardous Substance Superfund created by Section 111 of CERCLA, 42 U.S.C. 9611, contains monies available for use by the EPA in implementing various response activities. See *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 359-361 (1986) (describing structure and purposes of the Superfund).

[2] "Removal" actions are defined broadly and include a wide range of actions taken to study, clean up, prevent, or otherwise address releases and threatened releases. 42 U.S.C. 9601(23). "Remedial actions" are those actions "consistent with permanent remedy; taken instead of or in addition to removal actions * * *." 42 U.S.C. 9601(24). "Response" actions include removal and remedial actions. 42 U.S.C. 9601(25).

under which parties who comply with administrative orders may obtain reimbursement of their response costs from the Superfund. Thus, current Section 106(b) (2) (A) of CERCLA provides:

> Any person who receives *and complies with* the terms of any order issued under [42 U.S.C. 9606(a)] may, within 60 days *after completion of the required action*, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

42 U.S.C. 9606(b)(2)(A) (emphasis added).

If the EPA (on behalf of the President) refuses to grant a party's reimbursement petition, that party may file an action seeking reimbursement in federal district court. 42 U.S.C. 9606(b)(2)(B). In such an action, where the party has fully complied with the administrative order, it may recoup response costs by establishing, "by a preponderance of the evidence," that it is not liable for response costs under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), and that the costs it seeks to recover are reasonable in light of the action required by the administrative order. 42 U.S.C. 9606(b)(2)(C). Alternatively, a party who *is* liable for response costs under Section 107(a) may recover its reasonable response costs "to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." 42 U.S.C. 9606(b)(2)(D).

1. These consolidated cases arise out of the contamination, and eventual clean-up, of an oil recycling facility in Romulus, Michigan (the site). Petitioner issued a fire insurance policy to the owner

of a building in Wyandotte, Michigan. Gov't C.A. Br. 6. The building was destroyed by fire in August, 1987. Pursuant to the policy, petitioner agreed to have removed from the property certain debris, including fluids and oils contained in several electrical transformers. In April, 1989, seven hundred gallons of fluids were removed from the transformers and transported to the site in Romulus. At the site, the fluids were placed in process tanks for recycling. Pet. App. 20-21.

Soon after that, the EPA investigated the Romulus facility and determined that the site was contaminated by hazardous substances that posed an imminent and substantial danger to public health and the environment. Gov't C.A. Br. 3-4. The substances included polychlorinated biphenyls (PCBs)[3] and volatile organic compounds (VOCs).[4] Pet. App. 21. The EPA traced the source of the PCB contamination to the oil that was removed from the Wyandotte, Michigan, facility and transported to the Romulus site. *Ibid.*

On September 11, 1989, the EPA designated petitioner as a potentially responsible party (PRP) under

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[3] PCBs are a class of compounds, formerly used as nonflammable coolant in electrical equipment, that are extremely toxic. They have been found to cause cancer, liver damage, and other adverse health effects. See *Environmental Transp. Systems, Inc.* v. *Ensco*, 969 F.2d 503, 505 n.1 (7th Cir. 1992) (describing PCBs as "among the most hazardous man-made chemical substances.").

[4] VOCs also cause adverse human health effects, including cancer. See *Natural Resources Defense Council* v. *EPA*, 824 F.2d 1211 (D.C. Cir. 1987).

CERCLA[5] and requested petitioner's participation in the clean-up of the site. When petitioner failed to respond, the EPA issued an administrative order, pursuant to Section 106 of CERCLA, 42 U.S.C. 9606, in which it required petitioner and other PRPs to clean up the site. See Pet. App. 21. The order specified a number of clean-up tasks, none of which was limited to PCB-contaminated areas. *Id.* at 23.

Petitioner subsequently submitted an Emergency Response Action Plan (ERAP) in which it committed to "comply with the Order to the extent technically feasible under climatic conditions existing at the Site." Pet. App. 23. The EPA approved petitioner's ERAP on February 26, 1990. *Id.* at 22.

Petitioner began cleaning up the site, but it informed the EPA through several telephone calls and letters that it did not believe that it was responsible for cleaning up any non-PCB contamination. In response, the EPA insisted that both the order and the ERAP required petitioner to clean up all hazardous substances located at the site, whether or not they were contaminated by PCBs. Pet. App. 24. Petitioner ended its clean-up efforts on January 24, 1991, and contended that it had complied with the terms of the order. *Id.* at 24-25.

On March 22, 1991, petitioner submitted to the EPA a petition for reimbursement of its response costs. The EPA responded that petitioner had not yet completed the clean-up, as required by the order and

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[5] A potentially responsible party is any person who may be liable pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a), for response costs incurred, or to be incurred, by the United States, not inconsistent with the National Contingency Plan, 40 C.F.R. Pt. 300.

ERAP, and presented petitioner with a list of tasks that remained unperformed. Petitioner persisted in its position and the EPA completed the clean-up on October 25, 1991. Pet. App. 25.

On June 2, 1992, the EPA issued a preliminary decision denying petitioner's reimbursement petition on the ground that petitioner had failed to complete the required clean-up. In response, petitioner submitted numerous written comments and exhibits in support of its position. After reviewing petitioner's submissions, the EPA, on January 28, 1993, issued a final decision denying the petition for reimbursement. Pet. App. 25.

2. Petitioner filed two separate actions in federal district court, *Employers Insurance of Wausau* v. *Clinton*, No. 93 C 1366 (N.D. Ill.) (the *Clinton* case), and *Employers Insurance Company of Wausau* v. *Browner*, No. 91 C 4254 (N.D. Ill.) (the *Browner* case).

a. In the *Clinton* case, petitioner sued the President of the United States under Section 106(b)(2)(B) of CERCLA, 42 U.S.C. 9606(b)(2)(B), and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* In that suit, petitioner sought review of the EPA's decision to deny petitioner's reimbursement petition.

The district court granted summary judgment for the government. The court first observed that, while CERCLA provides for judicial review of the EPA's determination that a party is liable for response costs —pursuant to Section 106(b)(2)(C)—and for review of the extent of that liability—pursuant to Sections 106(b)(2)(D) and 113(j)—"there is no explicit provision for review of the EPA's determination that a party did not 'comply' with the relevant Order, and is thus not

entitled to consideration of its petition on the merits." Pet. App. 29. The court concluded that CERCLA does not provide for judicial review of EPA "compliance" determinations, and that review could be had pursuant to the APA, 5 U.S.C. 704, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." Pet. App. 31.

Pursuant to Section 706 of the APA, the district court considered whether the EPA's noncompliance ruling was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Based on its review of "the administrative record compiled and relied upon by the agency" (Pet. App. 34), the court upheld the EPA's decision that petitioner failed to comply with the agency's clean-up order and that consideration of the reimbursement petition was foreclosed. *Id.* at 32-34. Specifically, the court found the agency's conclusion that the order and ERAP applied to all hazardous wastes at the site to be "entirely supportable" (*id.* at 34), and determined, based on "undisputed facts, * * * that [petitioner] failed to comply with the Order and ERAP. Because compliance with the Order is, under CERCLA, a prerequisite to entitlement to reimbursement, [petitioner] is precluded from seeking reimbursement from the Fund." *Id.* at 37-38.

b. In the *Browner* case, petitioner filed an action for "nonstatutory review"[6] under 28 U.S.C. 1331 against the United States, the EPA, and various EPA officials. In that action, petitioner contended that the

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[6] See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), *Marozsan* v. *United States*, 852 F.2d 1469, 1474 (7th Cir. 1988) (en banc).

EPA's administrative process violated its Fifth Amendment rights to due process and equal protection. Petitioner also alleged that the EPA's designation of petitioner as a PRP was not supported by substantial evidence. See *Employers Insurance Company of Wausau* v. *Browner*, No. 91 C 4254 (N.D. Ill.), Third Amended Complaint 23-32.

The district court granted judgment on the pleadings for the government. With respect to petitioner's constitutional claims, the court concluded that CERCLA's administrative and judicial review provisions satisfy the due process criteria set out by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and that petitioner had not alleged disparate governmental treatment so as to implicate the equal protection component of the Fifth Amendment. Pet. App. 47-52, 58-59. The court dismissed petitioner's APA claim on the grounds that the EPA's designation of petitioner as a PRP was not reviewable under the APA (*id.* at 59-60), and that, in any event, petitioner had conceded the invalidity of that claim by failing to respond to the government's motion for judgment on that issue. *Id.* at 60 n.16.[7]

3. The court of appeals consolidated the two cases and affirmed the judgment in each. Pet. App. 1-17. With respect to the EPA's noncompliance determination, the court assumed, without deciding, that the ruling was subject to nonstatutory review. The

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[7] In a third suit brought by petitioner under the Federal Tort Claims Act, the district court dismissed the complaint and the court of appeals affirmed. *Employers Ins. of Wausau* v. *Bush*, 791 F. Supp. 1314 (N.D. Ill. 1992), aff'd, 27 F.3d 245 (7th Cir. 1994). Petitioner did not seek further review of that decision.

court held, however, that such agency action may also be reviewed in a suit for reimbursement under Section 106(b)(2). Pet. App. 7.[8] The court of appeals agreed with the district court that compliance with an administrative clean-up order is a prerequisite to consideration of a reimbursement claim. *Id.* at 7, 11.

The court reviewed the EPA's noncompliance determination under an "arbitrary or capricious" standard. Pet. App. 17. A deferential standard was appropriate, the court held, because petitioner sought review of the agency's interpretation of its own order, because the agency possesses statutory authority to issue and interpret clean-up orders, and because the question of compliance is technical in nature. *Id.* at 15-16.

Applying that standard to the facts of the case, the court upheld the EPA's determination that petitioner had not complied with the clean-up order. Pet. App. 17. Observing that "the Order by its terms embraces all hazardous substances at the recycling facility, regardless of the particular type of substance," the court found that the EPA's noncompliance determination was reasonable. *Ibid.*

The court rejected petitioner's constitutional claims as "baseless." Pet. App. 2. It held that, because a party served with a clean-up order may refuse to obey the order and obtain judicial review of its liability if and when the EPA seeks to enforce the order, CERCLA's judicial review provisions would be constitutional even absent the post-enforcement

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[8] The court noted that, in either type of suit, judicial review is confined to the record compiled in the administrative proceeding. See Section 113(j)(1) of CERCLA, 42 U.S.C. 9613 (j)(1). Pet. App. 7.

reimbursement mechanism contained in Section 106(b) (2). Pet. App. 11.[9]

ARGUMENT

1. The court of appeals correctly determined that compliance with an EPA clean-up order is a statutory prerequisite to the consideration of a reimbursement petition, and that the agency's evaluation of a party's compliance with such an order warrants deference. The court's decision, moreover, does not conflict with any decision of this Court or of another court of appeals.[10] Further review therefore is not warranted.

The plain language of Section 106(b) (2) establishes that only a party "who receives *and complies with the terms of*" an administrative clean-up order may seek reimbursement. 42 U.S.C. 9606(b)(2)(A) (emphasis added). That provision, moreover, expressly requires "completion of the required action." *Ibid.* "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).

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[9] The court also noted that potential sanctions for violating valid orders are tempered by the availability of a "sufficient cause" defense. Pet. App. 11, citing *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 391-392 (8th Cir. 1987) (construing 42 U.S.C. 9607(c)(3)).

[10] Contrary to petitioner's contention (Pet. 11-13), any conflict between the decisions of the district court and the court of appeals in this case would not warrant this Court's review. Cf. Rule 10.1 of the Rules of this Court. In any event, the courts below were in agreement that EPA's findings of non-compliance with the administrative order must be reviewed under a deferential standard. See Pet. App. 17, 33.

Once it determined that compliance with the EPA's order was a statutory condition for the consideration of a reimbursement claim, the court of appeals correctly deferred to the agency's interpretation of that order. As the court noted (Pet. App. 15), the court or agency that issues an order necessarily has special insight into the meaning and application of that order. *Martin* v. *Occupational Safety & Health Review Commission*, 499 U.S. 144, 150-151 (1991). In addition, EPA administrative orders of the kind at issue here are often highly technical in nature. Deference to the EPA's reading of the order accords with the agency's technical expertise in substantive matters arising under the statute. See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989).

Contrary to petitioner's contention (Pet. 14-19), the court of appeals' decision in this case does not conflict with *Dico* v. *Diamond*, 35 F.3d 348 (8th Cir. 1994). In *Dico*, the EPA denied a petition for reimbursement on the ground that the clean-up order in that case was issued before the effective date of the reimbursement provision. *Id.* at 350. The Eighth Circuit disagreed, and held that the EPA's interpretation *of the relevant statute*—Section 106(b)(2)—was not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See, *e.g.*, *Dico*, 35 F.3d at 351 ("*Chevron* requires deference to an agency's interpretation *of a statutory provision* only if the agency is charged with administering the statute.") (emphasis added).

Consistent with *Dico*, the court below did not defer to the EPA's construction of Section 106(b)(2). Rather, it made an independent determination that compliance with an administrative clean-up order is a

precondition for consideration of a reimbursement petition. See, *e.g.*, Pet. App. 11 ("The terms 'compliance' and 'completed' in the statute cannot be tortured long or hard enough to yield authorization for [the construction advanced by petitioner]."). The court afforded deference only to the EPA's interpretation of its own *order*.[11] See Pet. App. 15 ("when the document is an order, the court or agency that issued it is, sensibly enough, considered to have special insight into its meaning, so review is deferential") (citing, *inter alia*, *Martin* v. *Occupational Safety & Health Review Commission*, 499 U.S. at 150-151). The decision below, which is the first to address a challenge to an EPA determination of noncompliance with a CERCLA Section 106 order, does not warrant this Court's review.

Petitioner contends that the court of appeals' decision conflicts with cases that address the scope of CERCLA liability under Section 107. Pet. 21, citing *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 901-902 (5th Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 722-723 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 268-270 (3d Cir. 1992). Neither the EPA nor either of the lower courts in this case, however, considered petitioner's liability under Section 107.

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[11] For the same reason, petitioner is incorrect in contending (*e.g.*, Pet. 9) that the decision below is inconsistent with *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990). In *Adams Fruit*, the Court declined to defer to the Department of Labor's construction of certain provisions of the Migrant and Seasonal Agriculture Worker Protection Act, 29 U.S.C. 1801 *et seq.* *Adams Fruit*, 494 U.S. at 649. The Court did not consider the degree of deference that should be afforded to an agency's interpretation of its own order.

The EPA issued the administrative order in this case to five *potentially* responsible parties. The order did not purport to impose or apportion liability. Rather, consistent with CERCLA's statutory objectives, the order sought to secure prompt abatement of imminent health and environmental dangers, unencumbered by extended litigation over the apportionment of liability. See *Kelley* v. *EPA*, 15 F.3d 1100, 1106 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 900 (1995); *Wagner Seed Co.* v. *Daggett*, 800 F.2d 310, 315 (2d Cir. 1986). Similarly, in reviewing the EPA's determination that petitioner had not complied with its clean-up order, neither the district court nor the court of appeals considered whether petitioner is ultimately liable under Section 107. Each court agreed with the EPA that petitioner had failed to comply with the agency's order, and that, as a result, petitioner could not avail itself of the reimbursement provision. See Pet. App. 17, 38.

2. The court of appeals correctly held that CERCLA's administrative and judicial review provisions satisfy the requirements of due process. Pet. App. 2-3, 11. That holding, moreover, is consistent with the decision of every other court of appeals that has considered the question. See *Wagner Seed Co.* v. *Daggett*, 800 F.2d at 315-316 (Section 106); *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 390 (8th Cir. 1987) (same); *Schalk* v. *Reilly*, 900 F.2d 1091, 1097-1098 (7th Cir.) (Section 113), cert. denied, 498 U.S. 981 (1990); *Barmet Aluminum Corp.* v. *Reilly*, 927 F.2d 289, 295-296 (6th Cir. 1991) (same); *Dickerson* v. *Administrator, EPA*, 834 F.2d 974, 978 n.7 (11th Cir. 1987) (same).

Reardon v. *United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc), is not to the contrary. In *Reardon*,

the agency filed a notice of lien on contaminated property pursuant to Section 107(*l*) of CERCLA, 42 U.S.C. 9607(*l*). The court found that the lien notice was a deprivation of a significant property interest, and that CERCLA provided neither a pre-deprivation hearing nor adequate post-deprivation review. As a consequence, the court held, the lien provision denied property owners due process. 947 F.2d at 1518-1519.

As the court of appeals in this case observed (Pet. App. 11), CERCLA's administrative order provisions include both pre- and post-enforcement review mechanisms. Parties who disagree with the substance or scope of a clean-up order may refuse to comply with that order and receive a judicial hearing as to their liability, and other defenses to the order, if and when the EPA seeks to enforce the order. Unlike the lien provision at issue in *Reardon*, moreover, if the EPA never seeks enforcement, there is no deprivation. Compare *Reardon*, 947 F.2d at 1518 (noting impairment to property rights caused by outstanding liens and attachments).

The reimbursement provision added by the 1986 SARA amendments provides an adequate method of post-enforcement review. Where a party chooses to comply with an administrative clean-up order, it may petition for reimbursement and, if the agency denies the petition, seek judicial review. The fact that full compliance with the administrative order is a prerequisite to post-enforcement review does not invalidate the statutory framework (which, as we have noted, includes the pre-enforcement review alternative). See *Wagner Seed Corp.* v. *Daggett*, 800 F.2d at 316-317.

The court of appeals correctly concluded that petitioner was not denied due process in connection

with the clean-up order in this case. Petitioner asserted its substantive position during the administrative process (Pet. App. 24-25), and had the opportunity to seek a judicial hearing—before having to comply with the order—in which it could have obtained an adjudication of its liability and raised any defenses to the order. See, *e.g.*, *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d at 390; *Gary Steel Supply Co.* v. *Reagan*, 711 F. Supp. 471, 472 (N.D. Ill. 1989). In addition, petitioner was aware of the EPA's interpretation of the administrative order before it chose to halt its clean-up activities. Pet. App. 24. The limited post-enforcement review that was available to petitioner as a result of its own choices of how to proceed is not a denial of due process. See *AJA Associates* v. *Army Corps of Engineers*, 817 F.2d 1070, 1073 (3d Cir. 1987) (an "applicant cannot lay blame on an agency for the applicant's own failure to pursue every available channel of advocacy").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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